SEP 4
MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-232

FRED VIGORITO, ALEXANDER NOCE, DIEGO ASARO,
Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GUSTAVE H. NEWMAN
522 Fifth Avenue
New York, New York 10036
Counsel for Petitioners

August 30, 1974

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
POINT I—The intercepted party had a right to examine the orders and affidavits that authorized the electronic interception	4
POINT II—The decision below deprives persons who are the subject of electronic interception of the return of the product of such interception even if same is patently unlawful	10
CONCLUSION	15
Appendix "A"	1a
Appendix "B"—Memorandum and Order	4a
Appendix "C"	7a
Appendix "D"	16a

CITATIONS

Cases:

Bova v. *U. S.*, 460 F2d 404 (2d Cir: 1972)	11
Boyd v. *U. S.*, 116 U.S. 616 (1958)	10
DiBella v. *U. S.*, 369 U.S. 121, 82 S.Ct. 654 (1962)	11

PAGE

Gelbard v. *U. S.*, 408 U.S. 41, 92 S.Ct. 2357 (1972) 6
Goodman v *U. S.*, 285 F.Supp. 245 (1968: District Court, Central District of California) 14

In Re Lochiatto, 497 F2d 803 (1974) 7
In Re Marcus, 491 F2d 901 (1974) 7
In Re Persico, 491 F2d 1156 (2nd Cir: 1974) ... 6

Katz v. *U. S.*, 389 U.S. 347, 88 S.Ct. 507 (1967) 13

Lapidus v. *U. S.*, 215 F2d 253 (2nd Cir: 1954) .. 10

Olmstead v. *U. S.*, 277 U.S. 438 12

Plymouth v. *Pennsylvania*, 380 U.S. 693 (1965) 10

U. S. v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613 (1974) 6
U. S. v. *Dickerson*, 291 F.Supp. 633 (1968: N.D. Illinois E.D.) 15
U.S. v. *Dickerson*, 413 F2d 1111 (1969: 7th Cir) 15
U. S. v. *Liddy; In Re Allen*, 12 CLR 2343 (1973: Court of Appeals, District of Columbia) 15

Wright v. *State of Florida*, 495 F2d 1086 (5th Cir: 1974) 15

Statutes and Rules:

United States Constitution, Fourth Amendment . 3
18 U.S.C. § 2515 3
18 U.S.C. § 2518 (8) (b) 3
18 U.S.C. § 2518 (8) (d) 3
18 U.S.C. §2518 (10) (a) 3
Rule 41 (e), Federal Rules of Criminal Proc. 3

Other Authorities:

1968 U.S. Code Cong. and Admin. News at 2194 .. 5, 13
1968 U.S. Code Cong. and Admin. News at 2195 .. 14
1968 U.S. Code Cong. and Admin. News at 2177 .. 14
1968 U.S. Code Cong. and Admin. News at 2185 .. 15

IN THE

Supreme Court of the United States

October Term, 1973

FRED VIGORITO, ALEXANDER NOCE, DIEGO ASARO,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, Fred Vigorito, Alexander Noce and Diego Asaro, pray that a Writ of Certiorari issue to review the judgment entered on July 11, 1974 by the United States Court of Appeals for the Second Circuit in the proceeding entitled In Re Grand Jury Subpoenas of Fred Vigorito, Alexander Noce and Diego Asaro, Appellees vs. United States of America, Appellant, Docket No. 74-1322.

Opinions Below

The Circuit Court of Appeals for the Second Circuit reversed an order of District Judge Dooling dated January 2, 1974. A copy of the District Court's Memorandum and Order is set out in Appendix "B". The opinion of the United States Court of Appeals for the Second Circuit, reversing the order of Judge Dooling is set out in Appendix "C". The order of the Second Circuit Court of Appeals staying issuance of the mandate pending the application for a Writ of Certiorari is set out in Appendix "D".

Jurisdiction

The judgment of the Court of Appeals reversing the order of the District Court was entered on July 11, 1974. On August 15, 1974, the Court of Appeals stayed the issuance of the mandate pending an application for a Writ of Certiorari. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1) and under Rule 19 (1) of the Rules of this Court.

Questions Presented

(1) Does a person who has been advised that this voice was electronically intercepted and who is subpoenaed before a grand jury to furnish voice exemplars and complies with the request have the right under Title 18, United States Code, Section 2515 et seq and under Rule 41 (e) of the Federal Rules of Criminal Procedure to commence an action for the return of the property in the form of the recordings and transcripts of the electronic interception of his conversations?

(2) Does a party who has been notified that his voice has been intercepted by electronic interception and who is then summoned before a grand jury for the purposes of giving voice exemplars have the right after furnishing the exemplars to examine, under Court-imposed safeguards, the wire tap order and affidavit upon which the electronic interception was based?

Constitutional Provisions and Statutes Involved

This case involves the Fourth Amendment to the United States Constitution.

The Statutes involved are Title 18, United States Code, Sections 2515; 2518 (10(a), (8) (b), and (8) (d).

The Rule involved is Rule 41 (e) of the Federal Rules of Criminal Procedure.

Each of the foregoing are set forth in Appendix "A" of this Petition.

Statement of the Case

The Petitioners were notified in September, 1973 that their oral communications in April, May and June of 1973 had been intercepted. The interceptions were allegedly made through Court orders. Two of the orders were allegedly signed by one District Court Judge and allegedly authorized interceptions for 15 days each. The third Court order was allegedly signed by another Judge and allegedly authorized interception for 20 days.

The Petitioners were subpoenaed before a grand jury to provide voice exemplars which were to be compared with the electronically intercepted communications. They provided the exemplars as required which consisted of a reading of the first two paragraphs of the Declaration of Independence and were then allowed to leave and no testimony was taken of them before the grand jury nor to date have they been resubpoenaed. The Petitioners thereafter in December 1973 instituted an action by Notice of Motion and Affidavit which sought the suppression of the use of the intercepted conversations and a hearing to determine the validity of the alleged orders which authorized the interception. This was sought pursuant to Title 18, United States Code, Section 2515 et seq. In addition thereto, upon oral argument of the Motion, the Petitioners, through

counsel, amplified their argument to include return of the tapes and transcripts of the intercepted conversations pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure.

After extended argument, the Court granted the Motion to the extent that it ordered that the United States Attorney disclose to counsel for the Petitioners the orders and supporting papers to permit counsel to proceed further with the motion to suppress the use of the intercepted matter. The order further provided that until this was done the United States Attorney could not use before the grand jury any of the tape recordings, any matters derived from them or the voice exemplars. The order for delivery of the interception orders and supporting papers provided that counsel for the Petitioners was restricted from disclosing the contents thereof to the moving party in order to safeguard the interests of the United States Attorney.

The United States Attorney refused to comply with the order and appealed to the Second Circuit Court of Appeals which reversed the District Court. As previously indicated, the Circuit Court on motion stayed the issuance of the mandate pending the application for a Writ of Certiorari.

POINT I

The intercepted party had a right to examine the orders and affidavits that authorized the electronic interception.

Section 2518 (8) (d) requires that an inventory be served upon parties to intercepted conversations. Pursuant thereto, inventories or notices of interception were served upon the

Petitioners. The purpose of the Section is to alert the subject that he has been intercepted. In the legislative history of the Section, Congress anticipated this desired objective and envisioned that upon such notification, the subject could seek appropriate civil redress if he felt that his privacy had been unlawfully invaded. *1968 U.S. Code Cong.* and *Admin. News at 2194.* That is exactly the course of conduct pursued by the Petitioners at bar.

They instituted a civil action by the service of a motion to suppress amplified on oral argument to include a return of property.

Section 2518 (8) (d) provides in its applicable provision that upon the filing of a motion, the judge in his discretion may make available to counsel portions of the applications and orders amongst other things as he determines may be in the interests of justice. The District Judge at bar ordered that the affidavits and orders be made available. The United States Attorney opted not to comply with that order and, therefore, faced the alternative consequences of not being allowed to proceed against these Petitioners.

The Court of Appeals in its decision below reached its conclusion to reverse the District Court on the theory that it was purely a motion pursuant to Section 2515 to suppress Grand Jury testimony. In reaching this conclusion, the Court of Appeals placed its reliance upon *U.S.* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613 (1974) and *In Re Persico*, 491 F2d 1156 (2nd Cir: 1974).

I respectfully submit that the analysis and reliance was misplaced. Section 2515 of Title 18, United States Code, clearly bars the use of electronic evidence seized in violation

of the provisions of the appropriate article. The Section itself provides the bar without the remedy. Section 2518 (10) (a) provides the remedy in the form of a suppression motion in any trial hearing or other proceeding. This Section does not by its precise terms refer to a presentation to a Grand Jury.

In construing the effect of Section 2515 of Title 18, the Supreme Court has held that its provisions may be employed as a defense to a person charged with contempt. *Gelbard* v. *U.S.*, 408 U.S. 41, 92 S.Ct. 2357 (1972).

The question that has caused consternation is: What are the rights of a witness subpoenaed before a grand jury prior to his being placed in a position of being recalcitrant? This problem was alluded to by Justice White in *Gelbard* (supra) without resolution.

The Court of Appeals for the Second Circuit resolved the issue by deciding that all the witness had a right to was an in-camera examination of the Court orders that authorized the interception by a District Court Judge, and that if he was satisfied that they were valid, the witness was required to testify. *In Re Persico* (supra).

The Court of Appeals for the First Circuit concluded that Section 2515 and 2518 (10) (a) of Title 18, United States Code, were interrelated, thus a witness had a right to assert the grounds provided by the provisions of Section 2518 (10) (a).

They felt the wrong complained of in that case, i.e., the "Will Wilson" problem, was not a defect covered by the provisions of 2518 (10) (a). *In Re Marcus*, 491 F2d 961 (1974). The parting of the ways between the First and

Second Circuits was completed by the First Circuit's decision in *In Re Lochiatto*, 497 F2d 803 (1974), when in Footnote 7 at page 806 of the decision, the Court formally recognized the divergence of views and rejected the reliance placed by the Second Circuit in *Persico* (supra) upon the reasoning of the Senate report. The Court in *Lochiatto* (supra), speaking through Chief Judge Coffin, reconciled the problem as one of a balancing of equities. He recognized the oft announced goal of not interrupting grand jury proceedings but also that this "does not command a bar against any disclosure" (807). The Court in *Lochiatto* (supra) recognized Congress' general skepticism of electronic interception and to give it practical effect balanced the equities by deciding that a witness had a right through counsel to examine the order and underlying documents. The Circuits who have spoken are thus split on the rights of a witness before a grand jury who has been advised that his conversations have been electronically intercepted.

Therefore, the reliance placed by the Second Circuit upon *Persico* (supra) in reaching their decision at bar, and the contrary conclusion by the First Circuit as first indicated by *Marcus* (supra) and later crystalized in *Lochiatto* (supra) coupled with their outright rejection of the *Persico* (supra) rationale warrant a resolution by this Court of the disagreement.

As previously alluded to, the Second Circuit also relied upon this Court's decision in *U.S.* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, as blanket authority for the proposition that persons had no right to object to the use before a grand jury of any unlawfully seized evidence. I submit that this is an overextension of *Calandra* (supra) for the Court

recognized the special safeguards attendant to electronic interception when it stated in Note 11 on pages 355-356:

> "The Court's holding rested exclusively on an interpretation of § 2515 and Tit. III, which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance. There was no indication, in either *Gelbard* or the legislative history of Tit. III that § 2515 was regarded as a restatement of existing law. As Mr. Justice White noted in his concurring opinion in *Gelbard*, § 2515 'unquestionably works a change in the law with respect to the rights of grand jury witnesses. . . .' 408 U.S. 69, 70, 92 S.Ct. 2372."

In *Calandra* (supra), we thus have special recognition of the rights of persons who have been the subject of electronic interception. In *Lochiatto* (supra), we have an announced recognition of this right even in light of the status of the subject, i.e., that he or she is an actual witness before a grand jury.

In this case, it must be remembered that the Petitioners were not actually witnesses before the Grand Jury when they instituted the underlying proceedings. They were citizens who were notified that their voices had been intercepted. They appeared and gave the compelled exemplars. The Grand Jury exercised no further interest, dominion or process over them. They then instituted a civil proceeding to suppress, while no other proceeding, either criminal or ancillary in the form of grand jury subpoena, were extant against them. As indicated, both the provisions of Section 2518(10)(a) and Congressional intent envision a motion and civil redress. The Petitioners did not seek to interrupt

the Grand Jury proceeding. The United States Attorney brought the delay, if any ensued, upon itself when it elected not to comply with the District Court's order for disclosure which it should be noted was exactly what the First Circuit proclaimed in *Lochiatto* (supra).

The basic factual difference between this case and *Persico* (supra) causes us to respectfully suggest that the Circuit Court analysis based upon *Persico* (supra) is not appropriate.

It is further submitted that the observation sometimes made that Section 2518(10)(a) does not contain any specific reference to Grand Jury proceedings is not applicable to the facts at bar. That Section authorizes a motion to suppress in any trial, hearing, or proceeding or before any Court. Hence, the motion to suppress was at least ancillary to a civil proceeding, if not in fact a civil proceeding itself. See: *Lapidus* v. *U.S.*, 215 F.2d 253 (2nd Cir. 1954); *Boyd* v. *U.S.*, 116 U.S. 616 (1958); *Plymouth* v. *Pennsylvania*, 380 U.S. 693 (1965). Thus, the motion had viability under the aforementioned terms of the Statute and in the expression of Congressional intent on the subject.

On the basis of the conflict between the First and Second Circuits as to the extent of disclosure available to persons who have been electronically intercepted, and also the lack of definition of the scope of the disclosure available to non-witnesses who have been electronically intercepted and who have availed themselves of civil remedies, the Court should grant Certiorari.*

---

* I suggest that the need for a review by the Supreme Court was recognized by the Second Circuit when they granted the stay of the mandate previously referred to.

POINT II

The decision below deprives persons who are the subject of electronic interception of the return of the product of such interception even if same is patently unlawful.

Rule 41 (e) of the Federal Rules of Criminal Procedure provides for the return of property which is seized as the result of an unlawful search and seizure.

Certainly the law is clear that a party may move to suppress and for the return of property prior to indictment. The Statute, by its very language, recognizes that the primary purpose of Rule 41 (e) is prior to indictment. It states that if the motion is made or comes on to be heard after indictment, it is treated as a Rule 12 motion thus recognizing that Rule 41 (e) is to cover the pre-indictment or information motion. See also: *DiBella* v. *U.S.*, 369 U.S. 121, 82 S.Ct. 654 (1962).

The Court below turned its decision on the narrow construction that electronic interception is not "property" as that term is used in Rule 41 (e). It did this in reliance upon its decision in *Bova* v. *U.S.*, 460 F2d 404 (2d Cir: 1972). The *Bova* case (supra) dealt with the appealability of a denial *after a hearing*, (emphasis supplied), of a motion to suppress electronic interception brought by witnesses subpoenaed to testify at a trial. The witnesses' motion to suppress having been denied, they appealed. Pursuant to motion, the appeal was dismissed. In the course of granting the motion to dismiss the appeal on the grounds that the order of suppression was made in an ongoing criminal prosecution and was not appealable in reliance upon *Di-*

Bella v. *U.S.* (supra), the Court in dicta posed the question as to whether telephone conversations could be property in the ordinary meaning.*

This interpretation, we submit, is erroneous. In *Olmstead* v. *U.S.*, 277 U.S. 438, Justice Brandeis equated a telephone conversation with tangible property when he stated at page 475:

> ". . . The mail is a public service furnished by the government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below:
>
> > 'True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed and the other unsealed; but there are distinctions without a difference.' "

and at page 487:

> ". . . The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down."

---

* The decision below recognizes the format in which the question was posed when it states on page 4846 of the Slip Opinion: ". . . we held, albeit in the context of our appellate jurisdiction, that telephone conversations are not "property" as that term is used in Rule 41(e)."

This Court in *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), recognized that conversation was property. They stated on page 353:

> ". . . The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."

This is an implicit recognition of the fact that conversation is property for they talk in terms of the government's action as a search and seizure. In order for there to be a seizure, something had to be seized. Obviously, it was the conversations which are also the subject matter of the instant motion for the return of property and suppression. It is respectfully submitted that the Court below recognized that their overly narrow construction could not withstand examination in the light of the language contained in *Katz* and *Olmstead* (supra).

In addition to the judicial recognition of the fact that conversation is capable of seizure, Congress clearly recognized that conversation is tangible and the subject of a search and seizure. This is apparent in their language of the various Sections of Title 18. For example, Section 2518 (8) (d) talks in terms of an inventory. Implicit in the use of the word "inventory" are tangible items. Section 2518 (10) (a) talks in terms of suppression. It is submitted that there must be suppression of something. In the discussion of the legislative history of the Sections, Congress spoke again of inventories and equated the procedures they adopted with those applicable to search warrants. *1968 U.S. Code Cong. and Admin. News at 2194* (supra).

It should be noted in passing that in the expression of Congressional intent concerning suppression, Congress spoke in broad terms. Thus, in defining proceedings, they specified all adversary-type hearings. *1968 U.S. Code Cong. and Admin. News at 2195.* They also foresaw a situation identical to that at bar when they acknowledged that if a motion to suppress is granted in another context, it may prevent the use of that testimony before a grand jury. *1968 U.S. Code Cong. and Admin. News at 2195* (supra). This latter observation supports the Petitioners' contention in two respects. One, it indicates a further acknowledgment by Congress that conversations are tangible and capable of suppression, and, also, that suppression is not to be denied merely because its side effect would be to deny a grand jury the use of certain evidence.

Logic would also mitigate against the narrow construction sought to be placed on Rule 41 (e) by the Court below. To follow its rationale to its normal conclusion would mean that in the event there had been concededly unlawful interception, the victim thereof would be powerless to obtain its return and the product of this unlawful act would remain in the possession of the perpetrators for whatever improper use they sought to make of it.

The general concern that Congress exhibited concerning the use of electronic interception mitigates against a construction which would allow the victim of the unlawful act to be powerless to obtain the return of the property. *1968 U.S. Code Cong. and Admin. News at 2177.*

The broad scope that Congress granted to a motion to suppress under Section 2518 (10) (a) also rules out the narrow construction the Court below sought to apply. In *1968*

U.S. Code Cong. and Admin. News at 2185, in talking about suppression, it stated:

> " . . . But it does apply across the board in both Federal and State proceeding. Compare *Schwartz* v. *Texas*, 73 S.Ct. 232, 344 U.S. 199 (1952). And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. Compare *Adams* v. *Maryland*, 74 S.Ct. 442, 347 U.S. 179 (1954); *Mapp* v. *Ohio*, 81 S.Ct. 1684, 367 U.S. 643 (1961). The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications."

This narrow construction also would tend to deprive the Petitioners of equitable relief to protect their civil rights. It has recently been held that Section 2520 of Title 18, U.S. Code, which allows damages for unlawful electronic interception is an action to protect civil rights under Title 28, U.S. Code Section 1343 (4). *Wright* v. *State of Florida*, 495 F2d 1086 (5th Cir: 1974). Section 1343 (4) of Title 28, U.S. Code, provides for equitable or other relief. Certainly, the return of property under 41 (e) would be either equitable or other relief. Yet, if the construction given by the Court below to 41 (e) is followed, it creates a conflict with the provisions of Title 28, U.S. Code, Section 1343 (4).

In other contexts, various Courts have found no difficulty in ordering the suppression and return of property in the form of conversations wrongfully seized pursuant to Rule 41 (e). Thus, in *Goodman* v. *U.S.*, 285 F.Supp. 245 (1968: District Court, Central District of California), the District

Court ordered the suppression and return of records and admissions allegedly made to Internal Revenue Service agents without the proper advice of rights. In *U.S.* v. *Dickerson*, 291 F.Supp. 633 (1968: N.D. Illinois E.D.), the District Court pursuant to a Rule 41 (e) motion ordered the suppression and return of property including documents and statements made to Internal Revenue Service agents without the requisite *Miranda* warning. This decision was affirmed by the Court of Appeals in *U.S.* v. *Dickerson*, 413 F.2d 1111 (1969: 7th Cir.), without any comment or reference that statements, i.e., oral interviews, were not property within the meaning of 41 (e). The Court of Appeals for the District of Columbia in *U.S.* v. *Liddy; In Re Allen*, 12 CLR 2343 (1973: Court of Appeals, District of Columbia—no other citation could be found) authorized the suppression of conversations of non-defendants which were unlawfully intercepted. It would, therefore, seem that the overly narrow view applied by the Court below has not been followed and the Courts have primarily concerned themselves with the protection of the individual's Constitutional rights.

If the Rule 41 (e) proceeding has viability, then it bolsters our contentions in Point I since the motion to suppress aspect would be incidental to and made part of the separate civil proceeding under Rule 41 (e).

Based upon (a) the absence of clear judicial expression on the use of Rule 41 (e) in connection with intercepted conversations prior to indictment, and (b) the denial of the right to a victim of an unlawful electronic interception to obtain return of that material based upon the construction placed upon Rule 41 (e) by the Court below, the Court should grant the Petition for a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, *certiorari* should be granted and the judgments below reversed.

Respectfully submitted,

GUSTAVE H. NEWMAN
522 Fifth Avenue
New York, New York 10036
(212) MU 2-4066
Attorney for Petitioners

August 30, 1974

Appendix "A"

Constitutional Provisions:

Amendment IV—Searches and Seizures.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statutory Provisions:

Title 18, U.S.C., § 2515.

Prohibition of use as evidence of intercepted wire or oral communications.

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Title 18, U.S.C., § 2518.

"(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral

communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was interceped is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."

Title 18, U.S.C., § 2518.

"(8) (b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years."

Appendix "A"

Title 18, U.S.C., § 2518.

"(8) (d) . . . The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed."

Rules Provided:

Federal Rules of Criminal Procedure—Rule 41 (e). Motion for return of property.

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

Appendix "B"
Memorandum and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-C-1880

In the Matter of the Grand Jury Subpoena

of

FRED VIGORITO
ALEXANDER NOCE
DIEGO ASARO

The moving parties, it is not denied, are persons whose conversations have been intercepted and recorded while they were at the Highway Lounge; the interceptions were made by concealed microphone put in place under an 18 U.S.C. § 2518 order made on April 12, 1973, and extended on May 3, 1973, and May 24, 1973. The moving parties were in September 1973 served with the inventory and notice required by 18 U.S.C. § 2518 (8) (d). On November 30, 1973, after service of Grand Jury subpoenas directed to obtaining exemplars of their voices, the moving parties gave tape recordings of their voices to the United States Attorney in the understanding that they could be compared with recordings of the conversations made under the Section 2518(8) (d) orders referred to above. *United States* v. *Dionisio*, 1973 410 U.S. 1. They now move for a hearing to determine the existence and validity of the orders authorizing the interceptions, and, upon such hearing, for an

order suppressing the use of the intercepted conversations before the Grand Jury or for comparison with the recordings of their voices given to the United States Attorney. The motion is based on 18 U.S.C. § 2515 and Rule 41.

18 U.S.C. § 2515 forbids the use of intercepted oral communications and evidence derived from them before any grand jury, and, unless it is intended that the only safeguard against transgression of that prohibition shall be the *ex parte* judge's review of the material submitted to him to support the order for interception, it would appear that persons evidently exposed to indictment based on the use of intercepted conversations before the grand jury, should have a means of determining that the interception orders were issued and were issued upon a showing that met the standards of Section 2518. It may be that the rights outlined in 18 U.S.C. § 2518(10) are not available, for its language does not include the words "grand jury", as does the language of Section 2515; it may be that, for the same reason, Section 2517(3) neither authorizes nor forbids disclosure of the contents of such tape recordings to the grand jury by a witness familiar with their contents. Notwithstanding the absence of a specific statutory remedy, it is evident here that the search and seizure are complete and, it appears, the moment of use is at hand, and that the right of use is conditional upon the validity of the order. Within the limits indicated in *United States* v. *Sultan*, 2d Cir. 463 F. 2d 1066 at 1069-1070 (and note *United States* v. *Lam*, 2d Cir. 1973, Slip Opinions, September Term 1972, 4991), it is concluded, the moving parties have the right to have the orders and supporting affidavits disclosed to their counsel so that he may determine whether or not to advise a contest of the validity of the orders. *See United States* v. *Calandra*,

Appendix "B"
Memorandum and Order

6th Cir. 1972, 465 F. 2f 1218, 1223, *cert. granted*, 2/20/73, 410 U.S. 925; *Cf. Gelbard* v. *United States*, 1972, 408 U.S. 41. But *see Cali* v. *United States*, 1st Cir. 1972, 464 F.2d 475. In view, however, of the nature of the investigation counsel may not disclose the contents of the affidavits to the moving parties; at this stage non-disclosure to them does not diminish the utility of the disclosure in the service of any appropriate challenge to the sufficiency of the showing made by the affidavits. At least in the first instance the issue is whether or not a showing sufficient under Section 2518 was made to the *ex parte* judge to warrant the making of the interception orders. The issue is not, at this stage, whether at a hearing the Government could by testimony establish the existence of probable cause or the moving parties, by evidence, show an absence of probable cause.

It is accordingly

ORDERED that no use be made before any grand jury of any of the tape recordings taken pursuant to the orders of April 12, May 3 and May 24, 1973, of conversations of or implicating the moving parties, or any matter derived from them, or any use of the voice exemplars, until after disclosure to counsel for the moving parties (subject to the restriction on further disclosure to the moving parties set forth above) of the orders and the supporting papers and the expiration thereafter of a reasonable time for such counsel to proceed further with the present motion to suppress the use of the intercepted matter, matter derived from it and the voice exemplars.

Brooklyn, New York
January 2, 1974

.....

John F. Dooling, Jr.
U.S. District Judge

Appendix "C"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1063—September Term, 1973.

(Argued April 26, 1974 Decided July 11, 1974.)

Docket No. 74-1322

In re Grand Jury Subpoena of FRED VIGORITO, ALEXANDER NOCE, and DIEGO ASARO,

Appellees,

UNITED STATES OF AMERICA,

Appellant.

Before:

LUMBARD and HAYS, *Circuit Judges,* and JAMESON, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* granting the appellees' motion to discover court orders authorizing electronic surveillance, ordering that no use be made before any grand jury of any recording of conversations of the appellees until after disclosure to counsel for the appellees (subject to a restriction on further disclosure) of the orders and supporting papers, and permitting the appellees to proceed further with a motion to suppress the use of the intercepted matter.

Reversed.

* Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

Appendix "C"

FRED F. BARLOW, New York, New York (Edward J. Boyd, V, United States Attorney for the Eastern District of New York, Dennis Dillon, James W. Dougherty, Department of Justice, New York, New York, on the brief), *for Appellant.*

GUSTAVE H. NEWMAN, New York, New York, *for Appellees.*

HAYS, *Circuit Judge:*

The appellees' conversations in the Highway Lounge in Williamsburg, Brooklyn were overheard and recorded by means of microphones secreted by the government pursuant to court orders. Appellees are not currently defendants in any criminal action, and have not been called to testify before the grand jury which is investigating the subject matter of the conversations. They moved under Chapter 119 of Title 18 of the United States Code[1] to discover the contents of the interception orders and supporting papers, and to suppress the use and derivative use by the grand jury of tapes of their conversations. The district court granted the motion. The government appeals from the district court's order, which directs that no use be made of recordings of the appellees' conversations or matter derived therefrom without first disclosing to counsel for the appellees the contents of the authorizing orders

---

[1] 18 U.S.C. §§ 2510-20 (1970). Chapter 119 provides a comprehensive scheme for regulating wiretapping and electronic surveillance. It was added to Title 18 by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211 (1968).

and supporting papers, and which permits the appellees to move to suppress the intercepted matter after the expiration of a reasonable time after disclosure. The district court premised discovery of the orders entirely on its holding that the appellees have a right to pursue a motion to suppress, and on its finding that the orders will aid appellees' counsel in proceeding with such a motion. The principal issue on this appeal is whether one whose conversations are overheard pursuant to court-ordered electronic surveillance and who is not a criminal defendant or grand jury witness may move under 18 U.S.C. § 2515 (1970) to suppress the use of recordings of his conversations. We hold that he may not.

On April 12 and May 3, 1973, Judge Bartels of the Eastern District of New York signed orders permitted by 18 U.S.C. § 2518 (1970) authorizing the interception and continued interception of oral communications at the Highway Lounge. Judge Neaher authorized further continued interception on May 24, 1973. During April, May and June the oral communications of the appellees were overheard and recorded by concealed electronic equipment placed in the lounge. In September 1973 the appellees and about 40 other persons were served with inventories pursuant to 18 U.S.C. § 2518(8)(d) (1970), notifying them that the intercept orders had been entered and that oral communications had been intercepted. The appellees were subsequently served with grand jury subpoenas requiring them to provide voice exemplars for comparison with the intercepted communications. They were not required to testify before the grand jury. Each supplied an exemplar which consisted of a recitation of the first and second paragraphs of the Declaration of Independence.

Appendix "C"

The appellees moved the district court for discovery by their counsel of the surveillance orders and for suppression of the intercepted conversations. On oral argument they moved in the alternative for suppression and return of the intercepted conversations under F. R. Crim. Proc. 41(e). Without reaching the Rule 41(e) issue, Judge Dooling held that under section 2515 the appellees had the right to move for suppression, despite the fact 2515 does not by its terms provide a suppression remedy,[2] and despite the fact that the suppression procedure provided by Chapter 119, see 18 U.S.C. § 2518(10), does not by its terms apply to grand jury evidence.

Before reaching the statutory issue, we note that the exclusionary rule, a rule which permits a criminal defendant to suppress the use at his trial of evidence and the fruits of evidence obtained in violation of his constitutional rights, see *Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961), *Wong Sun* v. *United States*, 371 U.S. 471 (1963), does not give the appellees the right to suppress the use of evidence by a grand jury. In *United States* v. *Calandra*, 414 U.S. 338, 94 S. Ct. 613 (1974), the Supreme Court held that a witness ordered to testify before a grand jury may not refuse to testify on the ground that the inquiry is derived from evidence obtained in the course of an unlawful search

---

[2] Section 2515 provides in relevant part:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515 (1970).

and seizure. The Court weighed the historic function and power of the grand jury against the prophylactic purpose of the exclusionary rule and concluded that the exclusionary rule's potential for impeding the grand jury's investigative function outweighs its potential for deterring illegal law enforcement activity. It refused to allow the witness in effect to bring on a suppression hearing by refusing to answer, expressing a "disinclination to allow litigious interference with the grand jury proceedings." 414 U.S. at 350, 94 S. Ct. at 621. The *Calandra* rationale applies with equal force in a case like the present, where a suppression hearing is brought on by a non-witness's motion. The non-witness's interest in the investigation is more tenuous than a witness's interest since he is not subject to the court's contempt power. Giving the present appellees the benefit of the exclusionary rule would interfere with the function of the grand jury to an even greater extent than giving the benefit of the rule to witnesses, yet it would not have a greater deterrent effect on illegal law enforcement activity.

Thus, if the appellees are entitled to move to suppress grand jury evidence, such entitlement must be based on a specific statute rather than the exclusionary rule. The district court held that section 2515 is a statutory basis for a motion to suppress grand jury evidence. We disagree.

In *In re Persico*, 491 F.2d 1156 (2d Cir. 1974), a case decided after the entry of the order in the present case, we held that a witness before a grand jury who has refused to answer a question and who is being proceeded against for contempt may assert the defense that the question posed is the product of electronic surveillance unlaw-

ful under Chapter 119 "only if there is an absence of a necessary court order or if there is a concession from the Government that the surveillance was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful." 491 F.2d at 1162 (emphasis in original). The defendant in that case argued that he should be permitted a plenary hearing to test the validity of the electronic interception from which the question derived, relying mainly on *Gelbard* v. *United States*, 408 U.S. 41 (1972). We rejected that argument, noting that while the *Gelbard* court held that in a contempt proceeding a witness who refuses to testify before a grand jury may avail himself of the defense that the question is derived from *unauthorized* electronic surveillance, it did not decide "whether [witnesses] may refuse to answer questions if the interceptions of their conversations were pursuant to court order." 408 U.S. at 61 n.22. Nevertheless, Mr. Justice White, writing a separate opinion supplying the decisive vote, see 408 U.S. at 69, suggested that, if an interception is supported by a court order, requiring a hearing as to the validity of the order would be an unwarranted infringement upon the traditional prerogatives of the grand jury:

> "Where the Government produces a court order for the interception . . . and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption

> of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best." 408 U.S. at 70.

In *Persico* we adopted Justice White's suggestion. We found that the legislative history of section 2518(10), the only provision in Title 119 that specifically provides for suppression hearings, indicates that Congress did not intend Title 119 to interfere with traditional methods of conducting grand jury proceedings so long as the interception is not patently illegal:

> "As noted, though Congress prescribed that illegal wiretap evidence must be excluded from all grand jury proceedings, hearings to suppress evidence were not to be permitted during such proceedings. These seemingly inconsistent policy determinations can be reconciled only by interpreting the statute as requiring exclusion only when it is clear that a suppression hearing is unnecessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no prior court order was obtained, or when the unlawfulness of the Government's surveillance has been established in a prior judicial proceeding. In these situations both statutory policies—the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings—are served. But where illegality is claimed and, if established, can be established only by way of a plenary suppression hearing, one im-

portant aim of the legislation would be frustrated." 491 F.2d at 1161-62.

The appellees do not claim that their case is one in which the tapes of their conversations should or may be suppressed without a hearing; in fact they ultimately seek a hearing on their motion to suppress. Rather they argue that *Persico* does not govern this case because they are not witnesses before the grand jury, and because they are not being proceeded against for contempt. These two distinctions suggest that there is even less justification for a plenary suppression hearing in the present case than there was in *Persico*. In *Persico* our rationale for not allowing the witness to initiate a hearing on the legality of evidence derived from our concern that the hearing would impede the grand jury investigation. The same concern is dispositive in the present case. Were we to permit the boundless class of non-witnesses to move for suppression we would create an infinite potential for disruption of grand jury proceedings. If every not-witness overheard in the course of the electronic gathering of evidence were allowed to object to the consideration of that evidence, the jury's inquiry would move at a snail's pace pending the resolution of a myriad of suppression motions. Non-witness objection to grand jury evidence, if permitted at all, must be limited to those cases in which the illegality can be established without a hearing.

The appellees' alternate motion for the suppression and return of their conversations under Rule 41(e) has no basis in the text of the Rule. In *Bova* v. *United States*, 460 F.2d 404 (2d Cir. 1972), we held, albeit in the context of

our appellate jurisdiction, that telephone conversations are not "property" as that term is used in Rule 41(e). We see no reason to apply a different standard in this case. Decisions urged upon us by the appellees which extend the protection of the Fourth Amendment to governmental seizures of intangibles, compare *Katz* v. *United States*, 389 U.S. 347, 353 (1967), with *Olmstead* v. *United States*, 277 U.S. 438, 457, 466 (1928), are not relevant to the narrow issue of what constitutes "property" as that term is used in Rule 41(e). Since the conversations are not property of the appellants, they are not subject to return and suppression under Rule 41(e).

Reversed.

Appendix "D"

74-1322

B 63

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of August, one thousand nine hundred and seventy-four.

In the Matter of
the Grand Jury Subpoena of Fred Vigorito,
Alexander Noce and Diego Asaro,

Appellees,

v.

United States of America,

Appellant.

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated July 29, 1974 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

J. EDWARD LUMBARD

.....

.....

PAUL R. HAYS

Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-232

FRED VIGORITO, ALEXANDER NOCE, AND DIEGO ASARO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were entitled to move to suppress the use before a grand jury of recordings of their conversations obtained by electronic surveillance.

Petitioners' conversations in a private room adjoining a bar and restaurant were overheard and recorded by means of concealed microphones placed by government agents pursuant to orders issued by the United States District Court for the Eastern District of New York on April 12 and May 3, 1973 (orders of Judge John R. Bartels), and May 24, 1973 (order of Judge Edward R. Neaher) (Pet. App. C, p. 9a). The signed orders and the accompanying applications and affidavits were sealed by the issuing judges pursuant to 18 U.S.C. 2518(8)(b) and placed in the vault of the Court Clerk (Appendix in the Court of Appeals, p. A 18). In September 1973, petitioners and about 40 other persons were served with inventory notices, as provided by 18 U.S.C. 2518(8)(d), notifying them that the

interception orders had been entered and that oral communications had been intercepted. Petitioners were subsequently served with grand jury subpoenas requiring them to provide voice exemplars for comparison with the intercepted communications. Petitioners supplied the requested voice exemplars, but were not required to testify before the grand jury (Pet. App. C, p. 9a).

In December 1973, petitioners went before a different judge of the district court, seeking a hearing to determine the existence and validity of the intercept orders and an order "suppressing such intercepted conversations from being used before any Grand Jury in this District, and further prevent[ing] the use of such intercepted conversations from being used to compare same to voice exemplars given by the above named parties" (Appendix in the Court of Appeals, p. A 3). At argument on the motion, petitioners moved in the alternative either for suppression or for return of the intercepted conversations under Rule 41(e), Fed. R. Crim. P. The judge held that petitioners had the right to move for suppression of the conversations under 18 U.S.C. 2515 and ordered that the prosecutor make no use of the intercepted conversations before the grand jury until counsel for petitioners could examine the documents supporting the interception and determine whether to proceed with the motion to suppress (Pet. App. B). The court of appeals reversed (Pet. App. C), holding (1) that the constitutional exclusionary rule could not be invoked by witnesses before the grand jury, (2) that 18 U.S.C. 2515 did not provide a statutory basis for a motion to suppress evidence before the grand jury, and (3) that the conversations were not "property" within the meaning of Rule 41(e).

1. Despite petitioners' attempt to portray themselves merely as "citizens who were notified that their voices had been intercepted" (Pet. 8) and who seek discovery only in connection with a civil action to suppress evidence (Pet. 5, 9), it is clear from the initial motion that they are potential grand jury witnesses who seek the suppression of grand jury evidence.[1] See *United States* v. *Dionisio*, 410 U.S. 1, where persons in exactly the same situation as petitioners were uniformly considered witnesses. There is, however, no basis in Title III of the Safe Streets Act for motions to suppress grand jury evidence. *Gelbard* v. *United States*, 408 U.S. 41, 59-61; *Cali* v. *United States*, 464 F.2d 475, 478-479 (C.A. 1). Such motions are also contrary to the wide latitude for evidence presented to grand juries, as recently expressed by this Court in *United States* v. *Calandra*, 414 U.S. 338, 343-345, and as understood by Congress when it enacted Title III (see *Gelbard* v. *United States, supra*, 408 U.S. at 60). Since petitioners are merely potential grand jury witnesses, and not civil contempt defendants, their contention here is not supported by the holding in *Gelbard* that grand jury witnesses "may invoke the prohibition of §2515 as a defense to contempt charges brought on the basis of their refusal to obey court orders to testify." 408 U.S. at 47.[2]

---

[1]Because the court of appeals stayed issuance of its mandate (Pet. App. D), the grand jury proceedings have been unable to go forward since January 2, 1974, the date of the district court's order.

As the court of appeals noted (Pet. App. C, pp. 11a, 14a), if petitioners are non-witnesses, their interest is even less able to defeat the interest in the unhampered operation of the grand jury system.

[2]Therefore, *In re Persico*, 491 F.2d 1156 (C.A. 2), certiorari denied, No. 73-1741, October 21, 1974; *In re Marcus*, 491 F. 2d 901 (C.A. 1), and *In re Lochiatto*, 497 F. 2d 803 (C.A. 1), cited by petitioners (Pet. 6-8), are inapposite because those cases involved grand jury witnesses defending against civil contempt for refusal to answer questions.

Petitioners do have a means of discovering the documents supporting the interception. 18 U.S.C. 2518(8)(d) provides that persons who have received inventory notices, as petitioners have, may file a motion with the issuing judge, who may, in his discretion, make available to them such portions of the intercepted communications, applications, and orders as he determines to be in the interest of justice. It is clear, however, from the sealing requirements of 18 U.S.C. 2518(8)(b)[3] and from 18 U.S.C. 2518(8)(d) that Congress intended that the issuing judge would control the recordings and authorization papers in the investigative stage of the proceedings and that access thereto by persons overheard would be only through the issuing judge.[4]

2. Petitioners contend that regardless of the language of Title III of the Safe Streets Act, they may seek suppression and return of their conversations under Rule 41(e), Fed. R. Crim. P. This contention was rejected by the court of appeals (Pet. App. C, pp. 14a-15a), relying on its opinion in *Bova* v. *United States,* 460 F.2d 404 (C.A. 2). In that case it held that seized conversations are not "property" within the meaning of Rule 41(e) because "[i]t is obviously impossible to excise and surrender to the appellants the memories of the agents who conducted the interceptions, and the tapes and logs, as tangible items, are the Government's property, not the appellants'." *Id.* at 407.[5] The same analysis applies here.

---

[3]Section 2518(8)(b) provides that applications made and orders granted under Title III shall be sealed by the issuing judge.

[4]Section 2518(8)(b) provides that for good cause shown the intercept papers may be unsealed by any district judge. This would be necessary, for example, if the issuing judge had retired, died, or was otherwise unavailable.

[5]While it may be useful at times to analogize the seizure of wire or oral communications to the seizure of physical property, it would be unreasonable to extend the analogy to hold such communications to be property under Rule 41(e). For example, if oral communications are property, then gambling communications would have to be deemed contraband and hence non-returnable.

Moreover, petitioners cannot maintain their motion to suppress under Rule 41(e) because the Rule "does not constitute a statutory expansion of the exclusionary rule," which itself does not permit suppression motions to interfere with the grand jury. *United States* v. *Calandra, supra,* 414 U.S. at 348-349, n. 6.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-232

FRED VIGORITO, ALEXANDER NOCE, AND DIEGO ASARO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

GUSTAVE H. NEWMAN
Attorney for Petitioners
522 Fifth Avenue
New York, New York 10036
Telephone: (212) MU 2-4066

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-232

FRED VIGORITO, ALEXANDER NOCE, AND
DIEGO ASARO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

Statement of the Case

This brief is submitted in reply to the Government's Memorandum in opposition to our Petition for Certiorari. It is directed toward the arguments raised by the Government in opposition to Point II of our Petition, i.e., the issue of the application of Rule 41(e) as a basis for a pre-indictment motion to suppress.

Rebuttal

The Government's Memorandum seeks to rebut our contention on two grounds: (1) on the authority of *Bova* v. *U. S.*, 460 F2d 404 (2d Cir. 1972) and (2) on the grounds of *U. S.* v. *Calandra*, 414 U.S. 338.

The reliance on *Bova* (*supra*) is misplaced for examination of that case indicates that the language of Judge Friendly concerning the issue at bar was dicta. More importantly, however, that language flies in the face of several contrary decisions, one of which emanates from the Second Circuit—*In Re Fried*, 161 F2d 453 (2 Cir. 1947). In *Fried* (*supra*), Judge Frank writing for the Court specifically reversed a District Court decision which refused to consider a pre-indictment suppression application of a confession. The reasoning of that case has been followed and adapted in at least two succeeding decisions from other Circuits.

In *Austin* v. *U. S.*, 297 F2d 356 (4 Cir. 1961), Chief Judge Sobeloff, writing for the Court, specifically recognized Rule 41(e) as providing a remedy pre-indictment for Fourth or Fifth Amendment violations.

In *Smith* v. *Katzenbach*, 35 F2d 810 (D.C. Cir. 1965), petition for re-hearing en Banc denied October 26, 1965, the Court recognized the right to a pre-indictment suppression application under Rule 41. In doing so, the Court relied on *Fried* and *Austin* (*supra*) and stated on page 814 that Rule 41 is a crystalization of the principal of equity jurisdiction. This is exactly what we urged upon the District Court, upon the Circuit Court and upon this Court.

The second contention of the Government, i.e., their reliance on *Calandra* (*supra*), we submit is misplaced. As indicated in our petition in chief, the footnote in *Calandra* (*supra*) excludes its applicability to electronic interception by virtue of the specific Congressional prohibition.

Calandra (*supra*) did not attempt to rule on the applicability of a pre-indictment application pursuant to

Rule 41(e) per se. It determined that material seized as a result of an unlawful physical search still could be presented to a grand jury.

As previously indicated, it did not effect the specific prohibitions of Title 18, United States Code, Section 2515 and thus left as viable the exclusion of unlawfully seized electronic material. Therefore, it follows that Rule 41(e) which has been historically the method for enforcing an individual's rights against an unlawful seizure remains as a vehicle for enforcing the rights created under the still viable Section 2515.

In passing, it should be noted that the statement on page 1, paragraph 2 of the Government's reply to the effect that the conversations in a private room were recorded is not in fact the situation. According to a statement by the Assistant United States Attorney before the District Court Judge, the devices were placed in booths in corners of the public portions of the bar apparently to intercept conversations of whomever would utilize those public areas.

In summary, it is submitted that in light of the rather wide use of electronic interception, the specific expression of Congressional skepticism concerning same and the viable existence of 41(e), a statement is required from this Court as to whether 41(e) is still available for pre-indictment suppression motions of illegally seized oral communication.

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Petitioners
522 Fifth Avenue
New York, New York 10036
Telephone: (212) MU 2-4066